No. 83-1027

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

On Petition For A Writ Of
Certiorari To The Supreme
Court Of Ohio

BRIEF IN OPPOSITION OF RESPONDENTS PHILIP K. AND CATHY J. POPE

DRODER & MILLER CO., L.P.A.
A. Dennis Miller
[Counsel of Record]
W. John Sellins
Counsel for Respondents,
Philip K. and Cathy J. Pope
410 Provident Bank Building
Seventh & Vine Streets
Cincinnati, Ohio 45202
(513) 721-1504

COURT INDEX PRESS, INC — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED

A. Will the Supreme Court of the United States exercise jurisdiction to consider a case in which the sole Federal question presented by Petitioner was not raised, preserved, or passed upon by the State Courts below?

B. Does the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment to the United States Constitution require a state Supreme Court to retroactively apply that state's comparative negligence statute to a case before it in which the retroactivity of the statute was not urged by Petitioner in either that Court or the state Courts below?

TABLE OF CONTENTS

	Page
Questions Presented	1
Statement of the Case	2
Reasons Why The Writ Should Be Denied	3
A. Petitioner Failed To Raise A Federal Question In The States Courts Below	3
B. The Decisions Of The State Courts And The Record Do Not Raise The Question Presented In The Petition	4
Conclusion	5

TABLE OF AUTHORITIES

Cases:	Page
Cardinale v. *Louisiana*, 394 U.S. 437 (1969)	3
Herndon v. *Georgia*, 295 U.S. 441 (1935)	3
Oxley Stave Co. v. *Butler County*, 166 U.S. 648 (1897)	3
Wilfong v. *Batdorf*, 6 O.St. 3d 100 (1983)	3, 4
Statutes:	
O.R.C. 2315.19	3, 4
28 U.S.C., Section 1257 (3)	4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1027

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

---

BRIEF IN OPPOSITION OF RESPONDENTS PHILIP K. AND CATHY J. POPE

Respondents, Philip K. and Cathy J. Pope respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Ohio in this case.

STATEMENT OF THE CASE

On July 23, 1979, Petitioner was involved in an intersection collision between his motorcycle and a pick-up truck when Petitioner failed to stop for an existing Stop sign and collided with a motor vehicle operated by Robert P. Cornett, who has proceeding lawfully through the intersection. Cornett was not made a party to Petitioner's action against the respondents herein in which it was alleged that some or all of them had responsibilities for maintaining the existing Stop sign at the intersection, that foliage had been permitted to grow which obscured the Stop sign, and that respondents' omissions had created a nuisance for which they should be required to respond in damages. The defense of contributory negligence was raised by all respondents in their pleadings.

Thereafter, respondents, Philip and Cathy Pipe, filed a Motion for Summary Judgment asserting that Petitioner was contributorily negligent as a matter of law. The governmental respondents likewise filed Motions for Summary Judgment asserting inter alia that Petitioner was contributorily negligent as a matter of law. Petitioner opposed the Motions for Summary Judgment denying he was negligent, but did not maintain the applicability of Ohio's comparative negligence statute to the case. All Motions for Summary Judgment were granted by the Trial Court.

Petitioner appealed the decision of the Trial Court to the intermediate Appellate Court and to the Supreme Court of Ohio. The appeals were grounded on the same issues and arguments that were presented to the Trial Court. At no time during the appeal proceedings did Petitioner assert the retroactive applicability of the comparative negligence statute. The intermediate appellate Court affirmed the Trial Court ruling and the Supreme

Court of Ohio declined to exercise jurisdiction, dismissing Petitioner's appeal for want of a constitutional question and dismissed the Motion for an order directing the Court of Appeals to certify its record.

During the time the case was pending in the Supreme Court of Ohio, that Court held in *Wilfong* v. *Batdorf*, 6 O.St. 3d 100 (1983) that Ohio's comparative negligence statute, O.R.C. 2315.19, was to be applied retroactively to negligence actions tried after its effective date of June 20, 1980.

REASONS WHY THE WRIT SHOULD BE DENIED

A. Petitioner failed to raise a Federal question in the state Courts below.

The sole Federal question presented in the Petition relates to Petitioner's claim that Petitioner's rights to Equal Protection and Due Process were violated as the result of the purported failure of the state Supreme Court to retroactively apply the state's comparative negligence statute to this case when that Court had previously determined that the statute should be applied in a different case.

At no time during the proceedings before the state Supreme Court did Petitioner present this issue. This Court will not exercise jurisdiction over a case in which the sole Federal question presented by Petitioner was neither raised nor decided in the state Court below. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969). Where the Federal question asserted by Petitioner was not unmistakably raised in the state court, a writ will not issue, *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648 (1897), and the Federal issue will be deemed waived. *Herndon* v. *Georgia*, 295 U.S. 441 (1935).

Petitioner's failure to raise the Federal question presented to this Court in the state Courts below is fatal to Petitioner's assertion of jurisdiction pursuant to 28 U.S.C., Section 1257 (3).

B. The decisions of the state courts and the record do not raise the Question Presented in the Petition.

The Petitioner contends that the Petitioner's rights to due process of law and equal protection have been violated as a result of allegedly disparate treatment of similarly situated litigants by the Supreme Court of Ohio. Petitioner claims that the result reached by the State Court in this case differs from the result reached in reference to similarly situated litigants in the case of *Wilfong* v. *Batdorf*, 6 O.St. 3d 100 (1983).

The Petitioner's failure to assert in a state court the legal principle which served as the basis for the state Court's holding in *Wilfong, supra*, is fatal to his claim of a violation of Petitioner's rights to Due Process of Law and Equal Protection. In reversing the intermediate appellate Courts, the Supreme Court of Ohio held that O.R.C. 2315.19, the Comparative Negligence Statute, would be given retrospective application and would be applied in all cases tried after June 20, 1980, the statute's effective date. 6 O.St. 3d, at Page 104.

The opinion in *Wilfong* noted that the Courts below have considered and rejected the plaintiff's arguments with respect to the retroactive application of O.R.C., 2315.19, the Comparative Negligence Act. 6 O.St. 3d, at Page 101. It is apparent that the litigants in *Wilfong*, as distinguished from Petitioner, argued and asserted the issue of retrospective application of the statute in the state Courts.

Neither the Due Process Clause nor the Equal Protection

Clause require a Court to treat a litigant who fails to assert an issue in the same way as one who does raise the issue. So long as there is a rational distinction for seemingly disparate treatment by a state Court, there is no denial of Petitioner's right to Equal Protection and the Due Process of Law.

CONCLUSION

Respondents respectfully submit that the question presented by the Petitioner was not raised, argued, or decided in the Courts below and further submit that the record does not support the issue raised by Petitioner. The writ should be denied.

Respectfully submited,

DRODER & MILLER CO., L.P.A.

By _____

A. Dennis Miller
W. John Sellins
Counsel for Respondents,
Philip K. and Cathy J. Pope,
410 Provident Bank Building
Seventh & Vine Streets
Cincinnati, Ohio 45202
(513) 721-1504